

COOLEY LLP
JOHN C. DWYER (136533)
(dwyerjc@cooley.com)
JEFFREY M. KABAN (235743)
(jkaban@cooley.com)
RITESH K. SRIVASTAVA (246477)
(rsrivastava@cooley.com)
JACQUELINE B. KORT (284370)
(jkort@cooley.com)
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
Telephone: (650) 843-5000
Facsimile: (650) 849-7400

Counsel for Defendants,
Affymax, Inc., John A. Orwin, Robert F.
Venteicher, Jeffrey H. Knapp, Anne-Marie
Duliege, Herb Cross, Kathleen Laporte, Ted
W. Love, Daniel K. Spiegelman, John P.
Walker, Christine Van Heek, Keith R. Leonard,
Jr., and Hollings C. Renton

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHRIS MISIALEK, Derivatively On
Behalf Of AFFYMAX, INC.

Plaintiff,

v.

JOHN A. ORWIN, ROBERT F. VENTEICHER,
JEFFREY H. KNAPP, ANNE-MARIE DULIEGE,
HERB CROSS, KATHLEEN LAPORTE, TED W.
LOVE, DANIEL K. SPIEGELMAN, JOHN P.
WALKER, CHRISTINE VAN HEEK, KEITH R.
LEONARD, JR., and HOLLINGS C. RENTON,

Defendants,

-and-

AFFYMAX, INC., a Delaware corporation,

Nominal Defendant.

Case No. 3:13-cv-03832-WHO

**JOINT REQUEST FOR ORDER
REGARDING STAY AND ORDER**

Judge: Hon. William H. Orrick

1 Plaintiff Chris Misialek ("Plaintiff"), by and through his undersigned counsel, and
 2 defendants John A. Orwin, Robert F. Venteicher, Jeffrey H. Knapp, Anne-Marie Duliege, Herb
 3 Cross, Kathleen Laporte, Ted W. Love, Daniel K. Spiegelman, John P. Walker, Christine Van
 4 Heek, Keith R. Leonard, Jr., Hollings C. Renton, and nominal defendant Affymax, Inc.
 5 ("Affymax") (collectively, the "Defendants") (Plaintiffs and Defendants are collectively referred
 6 to herein as the "Parties"), by and through their undersigned counsel, hereby stipulate and agree
 7 as follows:

8 WHEREAS, on August 19, 2013, Plaintiff Chris Misialek filed the Shareholder Derivative
 9 Complaint for Contribution, Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust
 10 Enrichment (the "Complaint") asserting claims derivatively on behalf of nominal defendant
 11 Affymax, Inc. ("Affymax" or the "Company") against certain officers and directors of the
 12 Company (the "Federal Derivative Action");

13 WHEREAS, there is a securities fraud class action pending before the U.S. District Court
 14 for the Northern District of California ("District Court") captioned *Bartelt v. Affymax, Inc., et al.*,
 15 Case No. 3:13-cv-01025-WHO (the "Securities Class Action") asserting federal claims arising
 16 from facts common to this action;

17 WHEREAS, the damages alleged in the Complaint are, in part, related to the defense
 18 costs, potential settlement or potential adverse judgment in the Securities Class Action;

19 WHEREAS, on October 21, 2013, this Court entered an order staying this Federal
 20 Derivative Action until after a ruling on the motion to dismiss in the Securities Class Action (the
 21 "Stay Order");

22 WHEREAS, on January 21, 2014, the District Court entered an order granting in part and
 23 denying in part the motion to dismiss in the Securities Class Action (the "Order"). Pursuant to the
 24 Order, any amended complaint in the Securities Class Action shall be filed within 30 days of the
 25 Order;

26 WHEREAS, the Parties have met and conferred, consistent with the Stay Order, and have
 27 reached agreement that a stay of this Federal Derivative Action is warranted based on the facts
 28 and circumstances and considerations of judicial economy and efficiency, as set forth below:

1 **NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED**, by and among
 2 the undersigned counsel for the Parties, that:

3 1. This Federal Derivative Action is stayed in its entirety. Unless otherwise agreed
 4 by the Parties with the consent of the Court, this action shall remain stayed until resolution of the
 5 Securities Class Action;

6 2. Within 20 days of resolution of the Securities Action, the parties to this Federal
 7 Derivative Action shall meet and confer regarding whether the stay should remain in place or
 8 should be lifted, and shall present agreement, or their respective views, to the Court. Upon
 9 resolution of the Securities Action, no defendant shall have to respond to the Complaint until a
 10 new response date is set and/or approved by the Court;

11 3. If discovery proceeds in the Securities Class Action, and subject to entry of any
 12 appropriate confidentiality agreement or protective order that may be entered into by the parties
 13 in the Securities Class Action, Defendants agree to promptly provide Plaintiff with any and all
 14 discovery, formal or informal, that is produced or exchanged in the Securities Class Action.
 15 Defendants agree to provide such documents to Plaintiff, in the same form they are produced or
 16 exchanged in the Securities Class Action, within three business days of their production or
 17 exchange in the Securities Class Action;

18 4. Prior to a judicial determination that Plaintiff has adequately pleaded demand
 19 futility under Delaware law, the Parties agree that, absent a court order, documents and
 20 information obtained pursuant to this Stipulation shall not be used to amend Plaintiff's complaint
 21 and shall be protected pursuant to Federal Rule of Evidence 408; and

22 5. This Stipulation shall not preclude or prevent the Parties from stipulating to, or
 23 filing a motion seeking a court order lifting, modifying or extending the terms of this Stipulation
 24 upon a showing of good cause.

25 **IT IS SO STIPULATED.**

26 DATED: January 31, 2014

FINKELSTEIN THOMPSON LLP

27 By: /s/Rosemary M. Rivas

28 Rosemary M. Rivas (209147)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Rosemary M. Rivas (209147)
505 Montgomery Street, Suite 300
San Francisco, CA 94111
Telephone: (415) 398-8700
Facsimile (415) 398-8704
rrivas@finkelsteinthompson.com

L. Kendall Satterfield
Michael G. McLellan
Elizabeth R. Makris
James Place
1077 30th Street, NW, Suite 150
Washington, D.C. 20007
Telephone: (202) 337-8000
Facsimile: (202) 337-8090
ksatterfield@finkelsteinthompson
mmclellan@finkelsteinthompson
emakris@finkelsteinthompson
jplace@finkelsteinthompson

Counsel for Plaintiff, *Chris Misialek*

DATED: January 31, 2014

COOLEY LLP

By: /s/Jeffrey M. Kaban
Jeffrey M. Kaban (235743)

John C. Dwyer (136533)
(dwyerjc@cooley.com)
Jeffrey M. Kaban (235743)
(jkaban@cooley.com)
Ritesh K. Srivastava (246477)
(rsrivastava@cooley.com)
Jacqueline B. Kort (284370)
(jkort@cooley.com)
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
Telephone: (650) 843-5000
Facsimile: (650) 849-7400

Counsel for Defendants,
*Affymax, Inc., John A. Orwin, Robert F.
Venteicher, Jeffrey H. Knapp, Anne-Marie
Duliege, Herb Cross, Kathleen Laporte, Ted W.
Love, Daniel K. Spiegelman, John P. Walker,
Christine Van Heek, Keith R. Leonard, Jr., and
Hollings C. Renton*

ATTESTATION (CIVIL LOCAL RULE 5-1(i)(3))

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from the signatory.

Dated: January 31, 2014

COOLEY LLP

/s/Jeffrey M. Kaban

Jeffrey M. Kaban (235743)

Attorneys for Defendants
*Affymax, Inc., John A. Orwin, Robert F.
Venteicher, Jeffrey H. Knapp, Anne-Marie
Duliege, Herb Cross, Kathleen Laporte, Ted W.
Love, Daniel K. Spiegelman, John P. Walker,
Christine Van Heek, Keith R. Leonard, Jr., and
Hollings C. Renton*

* * *

ORDER

1
2 1. This Federal Derivative Action is stayed in its entirety. Unless otherwise agreed
3 by the Parties with the consent of the Court, this action shall remain stayed until resolution of the
4 Securities Class Action;

5 2. Within 20 days of resolution of the Securities Action, the parties to this Federal
6 Derivative Action shall meet and confer regarding whether the stay should remain in place or
7 should be lifted, and shall present agreement, or their respective views, to the Court. Upon
8 resolution of the Securities Action, no defendant shall have to respond to the Complaint until a
9 new response date is set and/or approved by the Court;

10 3. If discovery proceeds in the Securities Class Action, and subject to entry of any
11 appropriate confidentiality agreement or protective order that may be entered into by the parties
12 in the Securities Class Action, Defendants agree to promptly provide Plaintiff with any and all
13 discovery, formal or informal, that is produced or exchanged in the Securities Class Action.
14 Defendants agree to provide such documents to Plaintiff, in the same form they are produced or
15 exchanged in the Securities Class Action, within three business days of their production or
16 exchange in the Securities Class Action;

17 4. Prior to a judicial determination that Plaintiff has adequately pleaded demand
18 futility under Delaware law, the Parties agree that, absent a court order, documents and
19 information obtained pursuant to this Stipulation shall not be used to amend Plaintiff's complaint
20 and shall be protected pursuant to Federal Rule of Evidence 408; and

21 5. This Stipulation shall not preclude or prevent the Parties from stipulating to, or
22 filing a motion seeking a court order lifting, modifying or extending the terms of this Stipulation
23 upon a showing of good cause.

24 **IT IS SO ORDERED.**

25
26 DATED: January 31, 2014



The Honorable William H. Orrick
United States District Judge